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WAR CRIMES IN THE GULF WAR*

W. HAYS PARKS**

War crimes were committed by Iraq in its invasion and occupation of Kuwait. They were so widespread as to have been done with the authority and approval of the highest Iraqi authorities and, given the highly centralized command structure in Iraq, criminal responsibility for Iraqi war crimes clearly is directly attributable to Saddam Hussein.

Let me explain to you what has been done so far. We have had a Department of Defense Law War Program for the last two decades. In that program, the Secretary of the Army is assigned responsibility for the investigation and, if necessary, the prosecution of war crimes committed against U.S. citizens. Now, I stress that last part because it gives us a certain scope of investigation. If crimes are committed by particular U.S. military members, they are investigated by their respective services. But the responsibility for the investigation of a crime committed against a U.S. citizen belongs to the U.S. Army. The other aspect is that we are not the world's policeman, and, therefore, if we investigate in another country, and investigate offenses committed against a foreign citizen, we must do so with the consent of that particular nation or government. I am responsible for the Army War Crimes investigation program.

I started a file of Iraqi war crimes on August 3, 1990, the day following the invasion of Kuwait by Iraq. First, the invasion itself, in my opinion, violated the U.N. Charter. Second, U.S. citizens in both Iraq and Kuwait had been taken hostage by Iraqi authorities, and those who were in Kuwait were forcibly deported to Iraq to be used as human shields—all violations of the law of war. In mid-August 1990, an inter-agency meeting was held among officials

* The following comments were transcribed from the presentation given by Mr. Parks at St. John's University School of Law on March 6, 1992.

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from the Department of Defense, the Department of State, and the Justice Department to determine the United States position at that point in time. My investigation was the option selected for the moment. Two months later, in October 1990, President Bush warned Iraq of its liability for its war crimes. Two weeks after that, the United States was able to incorporate language regarding Iraq's accountability for its war crimes into the United Nations Security Council Resolution No. 674. An earlier United Nations Security Council Resolution, No. 664 of August 18, 1990, established unequivocally that the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War did apply in Kuwait, and that Iraq was an occupying power. In December 1990, anticipating that military force would be necessary to remove Iraq from Kuwait, the Secretary of the Army decided to mobilize two Army Judge Advocate Reserve teams to assist in the Army's war crimes investigation. One team would proceed to Saudi Arabia to collect evidence through the U.S. Central Command headquarters, and the second team would work in the Pentagon. The team sent to Saudi Arabia anticipated that two types of crimes would be committed by Iraq against U.S. citizens: one would be a chemical or biological attack—you may recall that those were very much on everyone's minds at that time; the second would involve mistreatment of U.S. prisoners of war, should Iraq capture any.

In December 1990, the U.S. hostages were released, and all returned home. With very few exceptions, most of them cooperated with our intelligence authorities in providing statements about their experience at the hands of the Iraqis. When the air campaign began, some U.S. military personnel were captured. All were physically abused in violation of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. Following their repatriation, each was interviewed, and their statements are in our files as well.

No other war crimes were committed against U.S. personnel, so, technically, that was the extent of the U.S. investigation. I would point out, however, that as part of our enforcement program, we have a pro-active program to make sure that any possible war crimes committed by U.S. personnel are investigated as well. There were approximately six investigations of possible war crimes committed by U.S. personnel, each of which proved to be unfounded.

Following the liberation of Kuwait, the army reserve Judge Advocate team in Saudi Arabia proceeded to Kuwait to collect in-

formation on Iraqi war crimes committed in Kuwait against Kuwaiti citizens. It was ordered to stop its investigations by the Kuwaiti Ministry of Justice, however, which felt—correctly—that such investigation was its responsibility. The U.S. Army team was granted limited authority for one month to collect information volunteered to it by Kuwaiti citizens. In Washington, we continued to collect information.

I would point out that Professor Robinson¹ offered the law of war standards, and I agree that the Iraqi destruction of Kuwaiti oil fields violated these standards.

At this point in time, the U.S. Army investigation sets forth a *prima facie* case of premeditated, widespread violation of the law of war by Iraq. The substance of the investigation will be summarized in a report on the conduct of the Gulf War by Secretary of Defense Cheney, which will be submitted to the Congress some time next month.²

The question at this time is, "Now what do we do?" We have a *prima facie* case established, and Saddam Hussein is still safely ensconced in Baghdad. Several things can be considered. Congressional interest remains high, as does interest of doing something within the Executive branch. We do not want to do something that accomplishes nothing, however. There is a recognition within the Bush administration, as well as within Congress, that a failure to take any steps might suggest that no enforcement mechanisms whatsoever exist and that the rule of law does not apply in war-time. That is not what we have in mind. The situation has obviously been exacerbated by Saddam Hussein's refusal to comply with the U.N. conditions of cease-fire to which he agreed in March 1991.

I would point out that the United Kingdom has also conducted a war crimes investigation. It is limited to personal acts against its own citizens, either captured prisoners of war or civilians who were taken hostage. The assumption—or educated guess, if I were to offer one—is that the U.S. and British reports will be

¹ See Nicholas A. Robinson, *International Environmental Law and War*, Speech at the *St. John's Law Review* Symposium on the Gulf War (Mar. 6, 1992).

² This report, entitled "Conduct of the Persian Gulf War," was submitted to the Congress by the Secretary of Defense on April 9, 1992. Appendix O therein addresses law of war issues that arose in the course of the conflict, including the war crimes issue. The author was the principal author of Appendix O.

submitted to the United Nations, either to the Secretary General or to the Security Council.